

No. _____

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

SCANDINAVIAN-AMERICAN BANK,
a Corporation,

Appellant,

vs.

R. L. SABIN, Trustee of the Estate of
D. Sondheim, Bankrupt,

Appellee,

In the Matter of D. Sondheim, Bankrupt.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United
States for the District of Oregon.



CITATION ON APPEAL.

UNITED STATES OF AMERICA,)
District of Oregon,) ss.

To R. L. Sabin, Trustee of the Estate of D. Sondheim, bankrupt, Greeting:

WHEREAS, Scandinavian - American Bank, a corporation, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

You are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland, Oregon, in said District, this 26th day of May in the year of our Lord, one thousand nine hundred and fifteen.

CHARLES E. WOLVERTON, Judge.

STATE OF OREGON, }
County of Multnomah, } ss.

Due service of the within Citation on Appeal is hereby accepted in Multnomah County, Oregon, this 27th day of May, 1915, by receiving a copy thereof, duly certified to as such by Sidney J. Graham, attorney for Scandinavian-American Bank.

SIDNEY TEISER,

Attorney for R. L. Sabin, Trustee.

Filed May 27, 1915. G. H. Marsh, Clerk.

**IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON,
NOVEMBER TERM, 1914.**

Be it remembered, that on the 19th day of November, 1914, there was duly filed in the District Court of the United States for the District of Oregon, a Petition for Order requiring the Scandinavian-American Bank to turn over certain property, in words and figures as follows, to-wit:

PETITION OF RECEIVER.

In the Matter of	}
D. SONDHEIM,	
Bankrupt.	

To Honorable Charles E. Wolverton and Honorable R. S. Bean, Judges of the District Court of the United States for the District of Oregon:

Comes now R. L. Sabin, receiver of the above entitled cause, and reports and petitions as follows:

I.

That he was the duly appointed receiver of the above entitled estate on the 16th day of November, 1914, and has qualified as such receiver by filing the requisite bond which bond has been approved and accepted herein.

II.

That as such receiver he has made demand for the stock and fixtures of the alleged bankrupt situated in the store building at No. 147 Sixth street, Portland, Oregon.

III.

That said stock and fixtures are claimed by the Scandinavian-American Bank of Portland, Oregon, under and by virtue of a certain instrument of writing, copy of which is herewith attached marked "Exhibit A" and which is in effect and in fact a mortgage securing the said bank for the payment of the sum of \$2600.00 or such portion thereof as may be due and unpaid under which said mortgage the said bank took possession of said stock at 4 o'clock on the afternoon of Friday, November 13, 1914.

IV.

That the said stock consists of merchandise which was on hand at the time the said mortgage was entered into, together with various other property which was purchased since the entering into of said mortgage.

V.

That said mortgage or agreement has not been recorded nor is it so acknowledged as to entitle it to record and that the same is therefore void as to creditors of said alleged bankrupt.

VI.

That the insurance upon said property is in the name of D. Sondheim.

VII.

That said bank has refused to deliver possession of said stock, although demand has been made upon it for the same.

VIII.

That said property is in fact and effect the property of said alleged bankrupt, and possession thereof should be delivered to the receiver.

IX.

That if the said Scandinavian-American Bank has any claim against said stock by virtue of said instrument herewith attached, it can maintain said claim against the proceeds in the hands of the receiver, or the Trustee hereinafter to be elected.

X.

That the said bank is now selling the said stock at retail.

Wherefore your receiver prays that an order be made directing said Scandinavian-American Bank of Portland, Oregon, and any other person in possession of said property for or on behalf of said

Scandinavian-American Bank forthwith to deliver said stock to the receiver, and to account to said receiver, or to the Trustee hereinafter to be elected for the proceeds of said stock which has been disposed of since they took possession under said instrument of writing or mortgage herewith attached.

Respectfully submitted,

R. L. SABIN, Receiver.

UNITED STATES OF AMERICA,)
District and State of Oregon, } ss.
County of Multnomah,)

I, R. L. Sabin, being first duly sworn, depose and say that I am the duly appointed receiver in the above proceeding, whose name is signed to the foregoing petition, and that all the facts contained therein are true as I verily believe.

R. L. SABIN.

Subscribed and sworn to before me this 19th day of November, 1914.

O. S. CROCKER,

Notary Public for Oregon, Residing at Tigard,
Washington County.

(Seal)

(Exhibit A referred to in the foregoing petition is Exhibit A attached to the amended answer and is printed on page 28 of this record.)

Filed November 19, 1914. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 25th day of November, 1915, there was duly filed in said Court, and cause a Stipulation to Sell Property in words and figures as follows, to-wit:

STIPULATION.

It is hereby stipulated and agreed by and between R. L. Sabin as receiver, through his attorney Sidney Teiser, and the Scandinavian-American Bank of Portland, Oregon, through its attorney Sidney J. Graham, as follows:

That whereas the Scandinavian-American Bank has possession of a certain stock of merchandise at No. 147 Sixth Street, Portland, Oregon.

And whereas the receiver lays claim to said stock of merchandise as part of the estate of the bankrupt; that the parties hereto consent that a sale of said stock of merchandise may be made under the following conditions:

First. That a joint inventory of said stock of merchandise shall be made by a representative to be selected by the bank and a representative to be selected by the receiver, but the price at which said property is to be inventoried shall be left to the sole determination of the receiver or his representative.

Second. That the said stock shall be sold by R. L. Sabin within ten days from the date of this

stipulation to the highest and best bidder therefor, it being understood and agreed that the Scandinavian-American Bank has the right to enter a bid for said stock the same as any other prospective purchaser.

Third. That the money received from the sale of the said stock of merchandise be deposited in the Scandinavian-American Bank to abide the decision of this Court as to the ownership of said stock of merchandise.

Fourth. That the Scandinavian-American Bank deliver to R. L. Sabin as receiver a cashier's check for said sum of money so deposited with it to be paid by it to R. L. Sabin, receiver, should the Court hold that the stock and fixtures are the property of the estate in bankruptcy, and to be surrendered by R. L. Sabin if the Court finds the ownership of the goods to be in the Scandinavian-American Bank.

It is also stipulated and agreed between the parties that neither party hereto shall have any claim upon the other for damages on account of the claim of the other to said stock of merchandise and that this stipulation is not binding until approved by the Court, but this provision shall in no wise effect the right of the receiver or Trustee in bankruptcy to an accounting for the moneys had and received by the Scandinavian-American Bank under and by reason of an instrument entered into between D. Sondheim and the Scandinavian-American Bank

dated October 23, 1914, which is attached to the Petition of Receiver for an order to show cause filed in this Court on the 20th day of November, 1914, if the stock and fixtures in question be determined to be the property of said estate.

SIDNEY TEISER,
Attorney for Receiver.

SIDNEY J. GRAHAM,
Attorney for Scandinavian-American Bank.

Approved Nov. 25, 1914.

CHAS. E. WOLVERTON, Judge.

Filed November 25, 1914. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 25th day of November, 1914, there was duly filed in said Court and cause an Order to Sell Property in words and figures as follows, to-wit:

ORDER.

On this day this cause comes on to be heard upon the application of Sidney Teiser, attorney for the receiver, and Sidney J. Graham, attorney for the Scandinavian-American Bank, for an order based upon a stipulation on file herein between the said parties authorizing the sale under the terms and conditions of said stipulation of that certain stock of merchandise located at No. 147 Sixth street, Port-

land, Oregon, and it appearing to the Court that it is to the best interests of the estate that said stipulation entered into between the parties be enforced.

It is ordered that R. L. Sabin as receiver and the Scandinavian-American Bank are hereby authorized and directed to make an inventory of said stock of merchandise and that R. L. Sabin is authorized and directed to sell the said stock of merchandise subject to the approval of this Court to the highest and best bidder therefor for cash within ten days from the date of this order.

It is further ordered that the money realized from the sale of said stock of merchandise be deposited with the Scandinavian-American Bank of Portland, Oregon, to abide the decision of this Court as to the ownership of the said stock of goods or to the proceeds realized from the sale thereof, and that the said Scandinavian-American Bank issue to R. L. Sabin as receiver, a cashier's check therefor to be paid by the said bank if the Court finds that the said stock of merchandise or the proceeds thereof belong to the estate and to be surrendered by said R. L. Sabin if the Court finds said stock of merchandise or the proceeds thereof belong to the said Scandinavian-American Bank.

CHAS. E. WOLVERTON,

Judge.

Dated Nov. 25, 1914.

Filed November 25, 1914. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 4th day of February, 1915, there was duly filed in said Court, and cause, an Amended Answer of the Scandinavian-American Bank, in words and figures as follows, to-wit:

ANSWER.

To the Honorable Chas. E. Wolverton and the Honorable Robert S. Bean, judges of the above entitled Court:

Comes now the Scandinavian-American Bank and without objecting to the jurisdiction of this Court summarily to try this matter files herein its amended answer to the petition of the receiver as follows:

I.

Admits Paragraph I.

II.

Admits Paragraph II.

III.

Denies Paragraph III and the whole thereof except that your respondent admits the execution of a certain instrument in writing attached to the petition of the receiver and marked Exhibit "A"; that your respondent took possession of said stock November 13, 1914.

IV.

Denies Paragraph IV and the whole thereof.

V.

Admits that said instrument was not recorded nor acknowledged so as to entitle it to record but denies each and every other allegation of Paragraph V and the whole thereof.

VI.

Admits Paragraph VI.

VII.

Admits Paragraph VII.

VIII.

Denies Paragraph VIII and the whole thereof.

IX.

Denies Paragraph IX and the whole thereof.

X.

Denies Paragraph X and the whole thereof.

And for a first further and separate answer and defense to said petition the Scandinavian-American Bank alleges:

I.

That at all the times herein mentioned and now it has been a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, with its office and principal place of business in the City of Portland, Multnomah County, Oregon, and that it is engaged in a general banking business.

II.

That on or about the 23d day of October it advanced the sum of \$2600.00 to D. Sondheim for the purchase of the stock of merchandise at No. 147 6th Street, Portland, Oregon, and entered into an agreement in writing with the said D. Sondheim, a copy of which said agreement is hereto attached marked Exhibit "A" and made a part hereof; that under and by virtue of said agreement and the understanding and intention of the parties, the title to said stock of merchandise remained in this respondent.

III.

That on or about the 13th day of November, 1914, the said D. Sondheim surrendered the possession of said stock of merchandise to this respondent who is now and since that time has continued in possession thereof; that your respondent has a complete record and the invoices of all purchases of merchandise or other property made by the said D. Sondheim and

added to the stock of merchandise since its purchase by it.

IV.

That in addition to the sum of \$2600.00 advanced to the said D. Sondheim for the purchase of said stock of goods, said D. Sondheim was indebted to this respondent in the sum of \$2600.00 on account of loans made to the said D. Sondheim on the 11th day of December, 1913, and the 8th day of July, 1914; that no part of either of said sums or the interest thereon has been paid, save and except the sum of \$2060.43 received on account thereof and that there is still due and owing from said D. Sondheim to this respondent the sum of \$3139.57 with interest thereon at the rate of 8 per cent per annum.

V.

That the said stock of goods, wares and merchandise is of the value of \$3476.70.

VI.

That your respondent acted in good faith in all its dealings with the said D. Sondheim upon a sufficient consideration and without any intent to hinder, delay or defraud any creditors of the said D. Sondheim.

And for a second and separate answer and defense to said petition the Scandinavian-American Bank alleges:

I.

That at all times herein mentioned and now it has been a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, with its office and principal place of business in the City of Portland, Multnomah County, Oregon, and that it is engaged in a general banking business.

II.

That on or about the 23d day of October it advanced the sum of \$2600.00 to D. Sondheim for the purchase of the stock of merchandise at No. 147 6th Street, Portland, Oregon, and entered into an agreement in writing with the said D. Sondheim, a copy of which said agreement is hereto attached marked Exhibit "A" and made a part hereof; that under and by virtue of said agreement and the understanding and intention of the parties, the title to said stock of merchandise remained in this respondent.

III.

That on or about the 13th day of November, 1914, the said D. Sondheim surrendered the possession of said stock of merchandise to this respondent who is now and since that time has continued in possession thereof; that your respondent has a complete record

and the invoices of all purchases of merchandise or other property made by the said D. Sondheim and added to the stock of merchandise since its purchase by it.

IV.

That in addition to the sum of \$2600.00 advanced to the said D. Sondheim for the purchase of said stock of goods, said D. Sondheim was indebted to this respondent in the sum of \$2600.00 on account of loans made to the said D. Sondheim on the 11th day of December, 1913, and the 8th day of July, 1914; that no part of either of said sums or the interest thereon has been paid, save and except the sum of \$2060.43 received on account thereof and that there is still due and owing from said D. Sondheim to this respondent the sum of \$3139.57 with interest thereon at the rate of 8 per cent per annum.

V.

That the said stock of goods, wares and merchandise is of the value of \$3476.70.

VI.

That your respondent was in possession of said stock of goods, wares and merchandise before any other right or lien of any other creditor attached and before a levy thereon by any creditor; that said sums of money were furnished to the said D. Sondheim in good faith for a sufficient consideration and with-

out any intent to hinder, delay or defraud any creditor of the said D. Sondheim.

And for a third further and separate answer and defense the Scandinavian-American Bank alleges:

I.

That at all the times herein mentioned and now it has been a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, with its office and principal place of business in the City of Portland, Multnomah County, Oregon, and that it is engaged in a general banking business.

II.

That on or about the 23d day of October it advanced the sum of \$2600.00 to D. Sondheim for the purchase of the stock of merchandise at No. 147 6th Street, Portland, Oregon, and entered into an agreement in writing with the said D. Sondheim, a copy of which said agreement is thereto attached marked Exhibit "A" and made a part hereof; that under and by virtue of said agreement and the understanding and intention of the parties, the title to said stock of merchandise remained in this respondent.

III.

That on or about the 13th day of November, 1914, the said D. Sondheim surrendered the possession of

said stock of merchandise to this respondent who is now and since that time has continued in possession thereof; that your respondent has a complete record and the invoices of all purchases of merchandise or other property made by the said D. Sondheim and added to the stock of merchandise since its purchase by it.

IV.

That in addition to the sum of \$2600.00 advanced to the said D. Sondheim for the purchase of said stock of goods, said D. Sondheim was indebted to this respondent in the sum of \$2600.00 on account of loans made to the said D. Sondheim on the 11th day of December, 1913, and the 8th day of July, 1914; that no part of either of said sums or the interest thereon has been paid, save and except the sum of \$2060.43 received on account thereof and that there is still due and owing from said D. Sondheim to this respondent the sum of \$3139.57 with interest thereon at the rate of 8 per cent per annum.

V.

That the said stock of goods, wares and merchandise is of the value of \$3476.70.

VI.

That your respondent acted in good faith in all its dealings with the said D. Sondheim upon a sufficient consideration and without any intent to

hinder, delay or defraud any creditors of the said D. Sondheim.

VII.

That said creditors of said D. Sondheim had actual notice and knowledge of the claim of this respondent; that said creditors were not deceived thereby; that the claims of the said creditors had arisen and credit had been given them prior to the 23d day of October, 1914, the time when your respondent advanced the sum of money for the purchase of said stock of goods, wares and merchandise; that in equity and good conscience said creditors ought not be heard to say that said dealings between your respondent and the said D. Sondheim were fraudulent and void.

WHEREFORE the Scandinavian - American Bank having fully answered the petition of the receiver prays that the said petition may be dismissed with costs.

SIDNEY J. GRAHAM,

Attorney for Scandinavian-American Bank.

"EXHIBIT A."

Agreement entered into this 23d day of October, 1914, by and between D. Sondheim, party of the first part, and the Scandinavian-American Bank, party of the second part, witnesseth:

Whereas, The Scandinavian-American Bank has furnished to D. Sondheim the sum of \$2600.00 to be used to purchase the goods, wares and merchandise of the store located at 146 Sixth Street, Portland, Oregon, under an agreement to protect the said party of the second part absolutely on said purchase.

Now therefore, said agreement is hereby reduced to writing and executed between the parties of the first part and second part in the following manner and form, to-wit:

It is understood and agreed between the parties hereto that the goods, wares and merchandise heretofore named were purchased with the money furnished by the party of the second part, and that said D. Sondheim holds title in the same as Trustee for the said party of the second part in so far as the holding of said title is necessary to protect and pay back to the party of the second part the sums of money owing by the party of the first part to the party of the second part.

It is understood and agreed that the party of the first part shall proceed to sell the said goods, wares and merchandise in the regular course of business,

and shall keep an accurate account of each day's sales, and one-half of the moneys taken in for the sale of said goods at the close of each day shall be turned over to the party of the second part at the opening of its banking hours the following day, until such time as the \$2600.00 advanced by the party of the second part, and any other indebtedness to the extent of \$2600.00 owing by the party of the first part to the party of the second part shall have been fully paid and satisfied.

It is further understood that the party of the second part shall have the right to install a cashier, whose wages shall be paid as part of the running expenses of the business by the party of the first part, to keep track of the receipts and disbursements from the sale of said merchandise, and to be cashier in charge of all moneys handled during said sale, said party to have access to all books, records, bills and invoices in connection with the said business heretofore referred to, and the sale and disposal of the same.

It is further stipulated that no sale of the bulk of said articles, goods, wares and merchandise first above named, shall be made without the consent of the party of the second part.

In witness whereof, the party of the first part has hereunto set his hand and seal, and the party of the second part has caused these presents to be signed by its duly authorized officers and its cor-

porate seal to be affixed, to this and another instrument of like import and tenor, the day and year first above written.

(Signed) D. SONDHEIM, (Seal)
Party of the First Part.

SCANDINAVIAN-AMERICAN BANK,
By Anthon Eckern, Cashier Scandinavian-American
Bank.

By _____,
Party of the Second Part.

STATE OF OREGON, }
County of Multnomah, } ss.

I, Anthon Eckern, being first duly sworn, depose and say that I am cashier of the Scandinavian-American Bank, a corporation, respondent in the above entitled matter; and that the foregoing answer is true as I verily believe.

ANTHON ECKERN.

Subscribed and sworn to before me this 25th day of January, 1915.

(Seal) A. L. MORLAND,
Notary Public for the State of Oregon.

Filed February 4, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 15th day of March, 1915, there was duly filed in said Court and cause an Order referring Petition to a Special Master, in words and figures as follows, to-wit:

ORDER OF REFERENCE TO MASTER.

BEFORE HONORABLE CHAS. E. WOLVERTON, AND HONORABLE R. S. BEAN, JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON:

This cause coming on this day to be heard upon the petition of R. L. Sabin, as receiver, for an order directing the Scandinavian-American Bank to turn over certain property belonging to the alleged bankrupt herein, and upon the order of this Court entered the 25th day of November, 1914, under stipulation of the parties herein, directing the receiver to sell the property petitioned to be turned over and that the money therein should take the place of and stand for the property itself, and upon the amended answer of the Scandinavian-American Bank filed in this court waiving the objections to the jurisdiction of the court herein to try the matter summarily, and upon the stipulation made in open court by the attorneys for the parties herein to the effect that the Trustee, R. L. Sabin, has authority to proceed in this matter in place of the receiver without further order of the Court, and upon further stipulation that the matter be referred to A. M. Cannon, Esquire, as Special Master to hear the

parties herein and take such evidence as they might desire to introduce as to the right to said property or its proceeds and report the same with his findings to this Court,

IT IS ORDERED

that the controversy herein concerning the right of the respective parties to the property in question or the proceeds thereof be, and the same is hereby referred to A. M. Cannon, Esquire, as Special Master, with directions to take such testimony and evidence as may be submitted to him, hear the parties as to their respective contentions, and to report to this Court with his findings and recommendations therein.

R. S. BEAN, Judge.

Filed March 15, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 19th day of April, 1915, there was duly filed in said Court and cause, the report of Special Master in words and figures as follows, to-wit:

REPORT OF SPECIAL MASTER.

TO THE HONORABLE DISTRICT COURT
ABOVE NAMED:

The undersigned Special Master, to whom was referred the petition of the estate of said bankrupt

to require the Scandinavian-American Bank to turn over to the said estate a certain stock of goods, has the honor to make the following report:

STATEMENT OF FACTS.

The material facts, as developed by the testimony, stipulation and documents on file, are as follows:

On and prior to October 22, 1914, D. Sondheim, the bankrupt, was engaged in the general mercantile business in Portland and elsewhere, buying and retailing bankrupt stocks of merchandise, and was, upon said date, indebted to the respondent, Scandinavian - American Bank, upon three promissory notes for the principal sum of \$3600.00, of which there remained unpaid \$2600.00, all past due.

On or about October 22, 1914, Sondheim, in contemplation of the purchase of the bankrupt stock of merchandise known as the D. N. Pallay stock in Portland, applied to the bank for an additional loan of \$2600.00 to enable him, in part, to make the proposed purchase, his net bid therefor having been \$5680.00. To this the bank consented, and thereupon Sondheim gave it his note for \$2600.00, the bank credited his account therewith, and an instrument in writing, copy of which is attached to the pleadings herein, was thereupon executed by the parties, in which it is recited, among other things, "That the Scandinavian-American Bank has fur-

nished to D. Sondheim the sum of \$2600.00 to be used to purchase the goods, wares and merchandise of the stock located at 146 Sixth Street, Portland, Oregon, under an agreement to protect the said party of the second part absolutely on said purchase" * * * "and that said D. Sondheim holds title to the same as Trustee for the said party of the second part insofar as the holding of said title is necessary to pay the party of the second part the sums of money owing by the party of the first part to the party of the second part."

It was stipulated in this instrument that the bank might install a cashier in the store to keep an account of the sales and the money taken in, and that Sondheim should turn over to it one-half the proceeds of the daily sales. This provision was not observed, but aside from it the understanding was that, to save the bank bookkeeping, in lieu thereof, Sondheim should pay the bank \$500.00 each week until the indebtedness was discharged. In practice neither requirement was respected by Sondheim.

Sondheim thereupon purchased the stock as planned, opened the store and continued the business until a few days prior to November 13, 1914, when he disappeared from Portland, has not been heard from since, and his whereabouts are now unknown.

During the time Sondheim was in possession of this stock, he was so as sole and exclusive owner;

he paid much more for the stock than the sum secured from the Bank; the muniment of title was his and not the bank's; the bank did not take possession through Sondheim, or any other person; no account of sales was rendered by Sondheim to the bank; the proceeds from the sales were deposited by him in the bank to his own credit in the ordinary course of business and commingled with funds received from other sources; the account was at all times subject to his check; and he was permitted to, and did, make large additional purchases of merchandise, claims for which are now made against the remainder of his estate.

On November 13, 1914, actions were brought by creditors against Sondheim and writs of attachment issued against his several mercantile establishments, the one in controversy among others. Before, however, this store could be taken into custodia legis, respondent bank, becoming apprised of the situation, entered the store, took possession and placed in charge one Eftland as agent or representative. This was upon the same day, and but a few hours before, the attempt to levy the attachment was made. Consequently, no levy could be made of the writ and this store was at no time levied upon.

Thereafter, this proceeding was commenced by the receiver appointed by this Court against the bank, and, by stipulation of the parties, the stock of goods was sold by the receiver and the money

derived from the sale deposited in lieu of the merchandise to abide the result hereunder.

My impression is, and I so find, that the bank entered into the contract with Sondheim in good faith and with no actual intent upon its part to hinder, delay or defraud creditors, but, further than insisting that Sondheim should make payments upon his indebtedness from time to time, the bank paid no attention to the operation of the business and never intended to, and did not, require any accounting by Sondheim of the sales made by him, and did not, and made no attempt to, acquire information concerning the running of the business further than to require Sondheim to pay \$500.00 upon his indebtedness once each week, and this requirement was not insisted upon by the bank and was not lived up to by Sondheim.

OBSERVATIONS AND CONCLUSIONS OF LAW.

The contract or agreement entered into by the parties is quite ambiguous in its character, but, looked at by the four corners, under the light shed by the testimony, it becomes apparent that nothing more was intended by it than that the bank should have security for its loan. It attests the understanding that the bank furnished the money to Sondheim, "under an agreement to protect the second party (the bank) absolutely"; further, "that

said D. Sondheim holds title in the same as Trustee for the said second party insofar as the holding of said title is necessary to protect and pay back the sums of money owing by the party of the first part to the party of the second part," but no further. Counsel for the bank maintains that the situation comes within the rule stated in *In re Cattus*, 183 Fed. 733, and other cases of like import construing trust receipts or agreements, but these cases do not apply here because the respondent bank at no time owned, or had title to, this property; it belonged to Sondheim from first to last, and trusteeship of a title itself presupposes a cestui que trust with the ownership thereof, in whole or in part. For the same reason, the transaction cannot be said to constitute a conditional sale contract.

In this case we have existing between Sondheim and the bank the common relation of debtor and creditor with the bank attempting to secure itself for the loan made by a **lein** upon the merchandise owned by Sondheim, and no unusual words or splendor of phraseology can make out of the transaction anything different. Hence this instrument, I conclude, was intended to be, and is, a chattel mortgage upon the goods, wares and merchandise mentioned therein. No other legal classification can be given this document under the laws of this state, so, if it is not a chattel mortgage, it is nothing.

It is not pretended that this instrument or chattel mortgage was recorded. It also is the fact that

until general alarm spread among Sondheim's creditors because of his disappearance, some twenty days after the execution of the mortgage, no move was made by the bank to take possession under the same and nothing whatever had taken place off the record that would apprise any creditor that the bank had, or claimed, any **lein** upon this stock. For all that appeared to the world, the bank had no claim to, or **lein** upon, or interest in, these assets. Under such circumstances, while no actual fraud may have been intended by the bank, a legal fraud was nevertheless perpetrated upon the other creditors of Sondheim.

The principal question then, in this case, is whether this mortgage is void under the laws of Oregon as construed by its highest Court. Section 799, Lord's Oregon Laws, is as follows:

“Every sale of personal property, capable of immediate delivery to the purchaser, and every assignment of such property, by way of mortgage or security, or upon any condition whatever, unless the same be accomplished by an immediate delivery, and be followed by an actual and continued change of possession, creates a presumption of fraud as against the creditors of the seller or assignor, during his possession, or as against subsequent purchasers in good faith and for a valuable consideration, disputable only by making it appear on the part of the person claiming under such sale or

assignment that the same was made in good faith, for a sufficient consideration, and without intent to defraud such creditors or purchasers; but the presumption herein specified does not exist in the case of a mortgage duly filed or recorded as provided by law.”

I think it cannot be open to question, at this day, that, under this statute, as construed by the Supreme Court of Oregon, and upon general equitable principles as announced by that Court, a chattel mortgage upon a shifting stock of merchandise which is not recorded, and under which the mortgagor is permitted by the mortgagee to remain in possession of the same, selling in due course of business, replenishing by new purchases upon credit, and not accounting to the mortgagee for the proceeds, is void as to all creditors’ general, attachment or judgment **lein**.

Orton vs. Orton, 7 Ore. 478.

Jacobs vs. Irvin, 9 Ore. 52.

Bremer vs. Fleckenstein, *id* 266.

Pierce vs. Kelley, 25 Ore. 95.

Gregg vs. Mueller, 66 Ore. 27.

In Orton vs. Orton, *supra*, it was held, upon general principles, that such a mortgage is void absolutely, the Court saying:

“But the statute (now Sec. 799, L. O. L., *supra*) is silent as to the effect of a provision

in a mortgage or an agreement between a mortgagor and a mortgagee that the mortgagor may sell the mortgaged property.

When this fact is made to appear, as in this case, then it becomes a question of law for the Court to determine what shall be the legal effect of such an agreement as affecting creditors of the mortgagor. * * * We think the weight of authority, as well as the reason, is in favor of the rule before indicated—that where there is unlimited power given by the mortgagee to the mortgagor to sell the mortgaged property which still remains in his possession, that the mortgage is void as against attaching creditors of mortgagor.’’

The doctrine of this case still obtains without modification in relation to any similar state of facts, and the presumption of fraud spoken of in the statute becomes conclusive as pertains to the situation in this case, under the rule announced by Judge Bean in *Pierce vs. Kelley*, *supra*.

In any event, it is enough, for the purpose of this report, that the Court of Appeals of this Circuit, in a late case, has specifically accepted this to be the doctrine of the Supreme Court of Oregon, and such acceptance is conclusive in this case.

Peterson vs. Sabin, 214 Fed. 234.

Counsel for the bank relies upon the rule announced in *Currie vs. Bowman*, 25 Ore. 364, which permits a mortgagor to remain in possession for the mortgagee, selling and rendering an account of the sales; but that was a far different case from this. In the first place, this mortgage never was recorded, which, in itself, is a prominent piece of vice, and the manner in which the parties conducted themselves under the mortgage cannot be justified upon any ground whatever. Sondheim was in the sole and exclusive possession as the owner; he sold as he pleased; bought as he pleased; rendered no account whatever to the bank, though it was stipulated that he should; the money derived from sales was deposited to his general account in the same bank and checked out by him unrestrained; indeed, the slight protective measure agreed upon aliunde the mortgage, that he should pay on his notes \$500.00 per week, was ignored and finally charged by the bank against his general account, perhaps from moneys received by him from other sources. As I have pointed out, there was not an indication, either off or on the record, by which any person could have been warned that the bank had the remotest claim upon this store, and hence it was, perhaps, that Sondheim was able to secure credit for merchandise running into the thousands of dollars after this mortgage was given. Whether so intended or not, this was a fraud, beyond dispute, and I do not think creditors are, or should be, bound by an arrangement fraught with such entire absence of

candor or open dealing. The effect of it was to conceal from the creditors completely the fact that Sondheim's property was encumbered, to enable him to sell and dispose of it regardless of that fact, and thus to hinder and delay them. To this the bank was a party and must be held to have intended what its attitude accomplished.

The respondent questions the right or power of the Trustee to maintain this suit, it being maintained, in effect, that none of the elements are present to bring the Trustee within the provisions of Section 47a (2), Amendment of 1910, for the reason there were no creditors holding the **leins** or writs there mentioned. I do not think it necessary for the Trustee to plant his case upon this section, but, if it were, the weight of authority is that it is not required there should be in fact creditors with the designated **leins**, but, rather, that the Trustee is deemed to have, and, in very truth, is invested with, the potential rights of such creditors; the intendment is simply that his rights are to be measured by the rules of law applicable in the case of creditors who might have obtained these advantages. This must be so, for, as one authority puts it, "If the operation of the amendment is restricted to cases in which a creditor has in fact acquired a **lein** by legal or equitable proceedings, then it adds nothing to the law as it was under the original act,"

In re Calhoun Supply Co., 26 A. B. R. 528, 189 Fed. 537.

Independent of this amendment, however, Sec. 67a and 70a (5) are ample to justify this proceeding. Sec. 67a reads:

“Claims which, for want of record, or for other reasons, would not have been valid liens as against the claims of creditors of the bankrupt, shall not be liens against his estate.”

And 70a (5) reads:

“The trustee * * * shall be vested by operation of law with the title of the bankrupt to all * * * (5) property which, prior to the filing of the petition, he could, by any means, have transferred, or which might have been levied upon and sold under judicial process against him.”

A good illustration of the operation of these sections is *Mitchell vs. Mitchell*, 12 A. B. R. 389:

“A trustee in bankruptcy may avoid a mortgage fraudulent under a bankrupt law. The title attempted to be passed by such mortgage vests in such trustee. He stands in the shoes of the bankrupt, but represents the creditors, and is entitled to possession, and may bring an action to enforce his right of possession. He can maintain any action either could maintain. Such an action is not analogous to a creditor's bill, and it is no objection to it that the claims against

the bankrupt are not in judgment. The title is vested in him by operation of law.

“The bankrupt law instead of vesting in the trustee the remedies of the creditors against the property judgment, execution and creditor’s bills (but since amendment of 1910 the trustee does have such rights) vests in him at once the title to the property—makes him the owner.

“It is argued that the mortgage in controversy being good as between the parties is also good as between the mortgagees and trustee in bankruptcy of the mortgagor; but the rule is well settled that the trustee represents the rights of creditors, and may attack conveyances made by the bankrupt in fraud of creditors. It is so provided in the statute. The trustee may prosecute any suit to recover assets in the hands of third parties, or to enforce the payment of claims that could have been prosecuted by the creditors themselves had no proceedings in bankruptcy been instituted.”

and Remington in the recently revised Second Edition of his work on Bankruptcy, at Section 1258, collates and learnedly classifies numerous authorities which he cites in support of the following text:

“Chattel mortgages with power of sale are void as against the trustee if there is no agreement that the proceeds be applied on the debt,

where such mortgages are held void as to creditors by the law of the state.

“The goods which the chattel mortgage thus authorizes the bankrupt to sell must pass to the trustee under Sec. 70 as being property which the bankrupt might have transferred before the bankruptcy.”

In one of these cases, *Standard Tel. Co.*, 19 A. B. R. 491, 157 Fed. 106, the mortgage was similar to the one in suit in that it permitted unrestricted sales, “provided only (2) the interest on the bond is paid; (b) sinking fund amounting to \$500.00 per quarter or \$2000.00 per annum is provided for.”

And *Remington* again states, at Sec. 1227¾:

“Where the state law invalidates the transaction as against any existing creditor, whether armed with process or not, then the trustee will be subrogated to the right of any such existing creditor, regardless of the amendment of 1910 arming him with process.”

These rules, it seems to me, leave no doubt of the Trustee's right to maintain this proceeding.

Finally, it is said that the taking possession by the bank before the filing of the petition cured the infirmities of this mortgage. Counsel must be mistaken, because, under the laws of this state, the mortgage was void *ab initio*. The bank never had a mort-

gage at any time, so far as the creditors of Sondheim are concerned, and, as we have seen, his Trustee has succeeded to their rights in avoiding it. The power of unlimited sale in due course of business, as contained in the document and as asserted and practiced by Sondheim, vitiated the whole transaction. Under such circumstances, taking possession does not operate as a filing of the mortgage, which is the most that can be claimed for that act in any aspect.

In *in re Barker*, 20 A. B. R. 674.

In *in re Reynolds*, 18 A. B. R. 666, 153 Fed. 295.

Zartman vs. First Nat'l Bank, 19 A. B. R. 27.

For the foregoing reasons, it is recommended that such order or decree enter herein as will restore to the Trustee the funds representative of the property in controversy.

There is handed up with this report the following documents:

- (1) The petition of the Trustee.
- (2) The answer and amended answer of the bank.
- (3) The restraining order issued.
- (4) The stipulation under which the property was sold and this matter submitted in summary manner.

(5) The testimony taken before the Special Master.

Respectfully submitted, this 16th day of April, 1915.

A. M. CANNON,
Special Master.

Filed April 19, 1915. G. H. Marsh, Clerk.

And Afterwards, to-wit, on the 19th day of April, 1915, there was duly filed in said Court, and cause, the testimony taken upon the petition of R. L. Sabin, in words and figures as follows, to-wit:

TESTIMONY.

Portland, Oregon, March 23, 1915.

10.00 A. M.

Claim of R. L. Sabin, trustee in bankruptcy, against the Scandinavian-American Bank, a corporation, to certain properties held by it.

Hearing before Honorable A. M. Cannon, special master, under order of reference of the United States District Court, for the district of Oregon.

Present: The Scandinavian-American Bank by its Cashier, Anthon Eckern, and Sidney H. Graham of counsel.

The Trustee was represented by Roscoe C. Nelson and Sidney Teiser.

A statement of the case was presented by Mr. Teiser, orally.

Mr. Graham presented argument and citations in support of the contention of the bank.

The facts were presented by Mr. Nelson, concurred in by Mr. Graham, as follows:

On October 23, 1914, an instrument, copy of which is attached to the answer of the bank and the petition of the Receiver was executed by D. Sondheim and delivered to the bank.

The Scandinavian-American Bank advanced Sondheim \$2600.00 on that date, to-wit: October 23, 1914.

The stock known as the D. M. Pallay stock was at or about that time purchased for the sum of \$5680.00 and the money paid to the seller by D. Sondheim.

That on November 13, 1914, R. L. Sabin, as assignee of several claims against D. Sondheim, caused a writ of attachment to be issues in an action brought by him on that day in the Circuit Court of the State of Oregon for Multnomah County. That an attempt was made to levy on the stock in question but that the same could not be levied because at a previous hour on the same day the agent of D. Sondheim, previously in charge of same, had surrendered the stock to the Scandinavian-American bank.

That D. Sondheim several days prior to November 13, 1914, had left the City of Portland and that his exact whereabouts were unknown to the creditors, and that diligent inquiry as to it to this day has not sufficed to locate said Sondheim's whereabouts.

That on November 14, 1914 a garnishment was

served in the said action on the Scandinavian-American bank to cover the said stock in its possession at that time.

That on November 16, 1914 a petition in involuntary bankruptcy was filed on D. Sondheim, and R. L. Sabin was appointed Receiver in said proceeding, and as such Receiver immediately made claim for said Stock, which claim was refused. That upon the petition of the Receiver an injunction was issued by Judge Wolverton of said Court restraining the transfer or disposition of said stock by the Scandinavian-American bank, without any final determination as to their respective rights, and that by an agreement between the Receiver (who subsequently became Trustee in this matter) and the said bank also without prejudice or any claim or right, the stock after being inventoried in the bankruptcy proceedings at the sum of \$8359.60, was sold by R. L. Sabin for the sum of \$3550.00, and the net proceeds of said sale, after payment of all expenses thereof, amounting to \$3476.70 was deposited in the Scandinavian-American bank also pursuant to stipulation, and a Cashier's check of said bank was issued in favor of R. L. Sabin, Trustee, for the last mentioned sum.

That in this proceeding the said money above named is to be regarded and treated as though it were the stock of goods.

That the said D. Sondheim has been subsequently adjudged a bankrupt and the said R. L. Sabin is now the duly qualified and acting Trustee in bankruptcy.

(Testimony of Anthon Eckern.)

That the Scandinavian-American bank is a corporation engaged in general banking business within the City of Portland, Multnomah County, Oregon.

It was stipulated between the parties present representing the Trustee and the bank that the statement heretofore made by Mr. Nelson and concurred in by Mr. Graham is a true and correct statement of the facts and circumstances underlying the controversy, in addition to the facts admitted to by the pleadings.

ANTHON ECKERN, was called as a witness and duly sworn, and testified as follows:

DIRECT EXAMINATION BY MR. GRAHAM.

Q. What position do you hold with the Scandinavian-American Bank?

A. I am the cashier of the bank.

Q. How long have you been cashier of that bank?

A. Since the bank was organized in 1908.

Q. Please go ahead now and relate to the Court the circumstances attending the execution of this agreement entered into between you for the bank on the one hand, and D. Sondheim on the other.

A. Mr. Sondheim came in in his nervous way and wanted to get \$2600.00 in order to purchase this stock. He said he was short that amount. He further stated that if we would advance him this \$2600.00 he would secure for us very soon the other

(Testimony of Anthon Eckern.)

\$2600.00 that he already owed us, so that the bank would be fully paid. He said he would turn over the whole stock to the bank, the bank could look after it just the same as he did, but that he wanted to handle the stock because he understood that business and we did not. That we could put somebody in the store to look out for it if we wanted to and that the stock would be considered as ours and handled for us.

Q. Did you advance him the sum of money?

A. Yes, upon that agreement made at that time we advanced him \$2600.00 and he purchased the stock and we put in a cashier to look after our interests and the cashier was instructed to report daily sales made in the store.

Q. Was anything said about the title to the stock?

A. Mr. Sondheim said that we would have the title but he wanted to handle the goods, to look after the managing part of it.

Q. And then, after your indebtedness had been paid the rest of the money realized would belong to him?

A. After we were paid \$5200.00 then he would get the title back to the stock and we would have nothing to do with it. That was the understanding.

Q. And so you advanced him \$2600.00 at that time?

A. Yes.

(Testimony of Anthon Eckern.)

Q. What other loans had you made to him prior to that time?

A. At that time he owed us \$2600.00 on three different notes. From time to time we advanced Sondheim money for different purchases and at this particular time he owed us \$2600.00 besides the \$2600.00 advanced him on that day.

Q. Has any part of that indebtedness been repaid—any part of any of the indebtedness he owed you?

A. He paid about \$1000.00. He gave us a check for \$500.00. The understanding was he was to give us \$500.00 every week to save the bank extra bookkeeping if he should turn over to us half the proceeds every day. If he did that it would involve more work and so he agreed to give us a check for \$500.00 every week, and he said if he did not do so on a certain day, on Monday I believe it was, that we were to charge his account with that much. He said we were sure to get it in that way and that arrangement saved us from handling small amounts of money each day. It saved our bookkeepers.

Q. In other words the original agreement provided that he was to deposit one-half the proceeds each day to your credit and that in order to save the bank the extra bookkeeping he agreed to give it to you in a lump sum of \$500.00 each week?

A. Yes.

Q. Is this payment of \$500.00 credited to his account?

(Testimony of Anthon Eckern.)

A. Yes, it has been endorsed on his notes.

Q. On what indebtedness has it been applied, the old or the new?

A. Applied on the old indebtedness.

Q. What other payments have been credited on his account?

A. Well, \$365.00 was credited.

Q. How did that arise?

A. We charged his account with \$365.00 on November 12, and \$195.00 on November 13.

Q. Did you have any understanding by which you could charge his account if he failed to make certain payments?

A. Yes, that was the understanding. If he was not there to pay on a certain day, as I stated before, we could charge his account.

Q. Your bank was the general depository for all funds he received from sales conducted by him at his various stores, were you not?

A. Yes.

Q. What sums of cash did you realize from the management of the store from the time you took possession on November 13, until it was closed up by order of the Federal Court, on November 23.

No answer.

MR. CANNON. Q. How much did you get in the ten days between November 13, and 23,—what cash was taken in that you got?

A. \$1000.43.

(Testimony of Anthon Eckern.)

Q. Is that after deducting all expenses?

A. Yes.

Q. What expenses did you have?

A. Salary for the boys in the store and some small miscellaneous expenses, making a total of \$145.75.

Q. Does that \$145.75 include all the expenses that you incurred?

A. All except the salary of the manager, Mr. Julius Efteland.

Q. He got \$36.40 out of this \$145.75 and is entitled to more than that for the ten days, is he not?

A. Yes.

Q. What then, Mr. Eckern, is the total gross receipts that you received from the sale of goods in the Pally store from November 13, 1914, up to and including the time the store was closed by the restraining order of the Federal Court?

A. \$1146.18.

Q. And out of that you paid what sum for expenses?

A. \$145.75.

Q. And there is still owing what amount for services rendered during that time?

A. We still owe Mr. Efteland for ten days services.

Q. And he has received on account of that how much?

A. \$36.40.

(Testimony of Anthon Eckern.)

Q. State whether or not you had possession of this stock of goods at the time the attempted levy was made?

A. We had.

Q. When did you take possession of the stock of goods, under what circumstances, and why?

A. The why is that we were trying to find Sondheim, trying to get hold of him so he could pay us that deficiency. It was claimed that he was up to Seattle or Tacoma, and we heard he was sick up there, but we could not get any reply from him. Mr. Nelson went over there and we couldn't hear from him. He was over there three days before we heard from him, so we decided that we had better put our own man in there in charge until Sondheim returned. We put a man in to represent us, to open up the store in the morning and stay there all day and lock it up at night.

Q. Were these loans made to Mr. Sondheim in good faith?

A. Yes.

Q. Did you have any intention of concealing anything or hindering, delaying or defrauding any of the creditors?

A. We did not.

Q. Was anything said about hindering or delaying any of the creditors at the time these loans were made?

A. No.

Q. Did you know whether this last loan made on

(Testimony of Anthon Eckern.)

October 23, 1914, was used for the purpose of this stock of goods—the \$2600.00 loan?

A. Yes, it was.

Q. Did you ever conceal from any of the creditors the fact that you claimed the ownership of the store until this sum was paid.

Question repeated.

Q. The sum of \$5200.00?

A. No, we never concealed it, but we were never asked the question to my recollection.

MR. GRAHAM: I would like at this time for the purpose of showing when this claim against Mr. Sondheim arose to have introduced the schedule or claim of the respective claimants.

It is stipulated by and between the attorneys for the bank and for the Trustee that either side may present and file a tabulation from the claims proven in the bankruptcy proceeding of D. Sondheim with reference to the dates on which the indebtedness was contracted by Mr. Sondheim for purchases.

CROSS-EXAMINATION BY MR. NELSON.

Q. Did you bring the Sondheim notes with you?

A. I have copies of them.

Q. Do you know that these copies of the notes and the endorsements thereon are correct—did you make them yourself?

A. No, they were handed to me this morning by the bookkeeper.

(Testimony of Anthon Eckern.)

Q. And you instructed him to make the copies as well as the endorsements?

A. Yes.

Q. Do you know in whose hand-writing the endorsements were made on the original notes?

A. The note teller, I am sure. Mr. Vogel.

Q. When a payment is made on a note at your bank—when a party has two or three notes outstanding—is it your system to enter the amount paid on your ledger, or do you give him credit on any particular note for the particular amount paid?

A. I do not catch your meaning.

Q. My question is this. Take an instance like that of D. Sondheim in which he owed you money on four notes. Now, if a payment is made by D. Sondheim of \$500.00, do you on your books credit that sum to his account or do you give him credit for it on any particular note.

A. No, we credited it on some particular note.

Q. Do your accounts in your ledger show the particular notes?

A. Yes.

Q. How do you do that, do you keep a separate page for each note?

A. Yes.

Q. And the account is kept in that way?

A. Yes.

Q. Did Sondheim give you any instruction as to the application of the payments when he made these payments to you?

(Testimony of Anthon Eckern.)

A. Did he give me any instructions as to what note to apply it on?

Q. Yes.

A. No he did not.

Q. Who made the application?

A. We did.

Q. You, or the other gentlemen whose name you mentioned a few moments ago?

A. I instructed him and he made the application.

Q. What instructions did you give him?

A. To apply it on the note specified.

Q. How did you pick out the particular note, did you consult your books to find out which note to apply it on?

A. No, I knew the notes by heart, which note to apply it on.

Q. Then you would tell your clerk to apply the payment on the \$2000.00 note or the \$800.00 note, or whichever it was?

A. Yes.

Q. You were not particularly concerned with the dates of the notes?

A. No.

Q. It was simply an arbitrary instruction on your part?

A. Yes, because we expected to get all these notes cleared up in a very short time and we did not pay much attention to the matter.

Q. When you made this loan of \$2600.00 to him

(Testimony of Anthon Eckern.)

you took his note for \$2600.00 payable on demand?

A. Yes.

Q. It had been your custom previously to take notes payable on demand, had it?

A. Yes.

Q. Did you advance him the \$2600.00 on the same day you took the note from him?

A. I think we did. He got credit for it on that day.

Q. You passed credit to him on your books so he could check on it.

A. Yes. It may be that the transaction was after banking hours.

Q. You charged interest from the date the note bears?

A. Yes.

Q. And this agreement, was it executed the date it bears?

A. Yes.

Q. The note of which you handed me a copy is dated the 22nd of October and the agreement is the 23rd?

A. Yes. He made provision to get the money the day before he got it, and he drew up the agreement on that day. We could not get hold of any attorney on that day, as I remember it now, it was late in the evening, after it was too late to get an attorney to draw it up and so we waited until the next day.

Q. Do I understand, on the day of that agree-

(Testimony of Anthon Eckern.)

ment you gave him credit for the \$2600?

A. That is my recollection.

Q. The interest charged is 8%?

A. Yes.

Q. Now, from whom did Sondheim purchase this stock of goods? The stock in controversy on 6th street?

A. I understood he purchased it from Mr. Sabin.

Q. In the bankrupt proceedings of D. Pally & Company?

A. Yes.

Q. Did you have any conversation with the seller of the stock of goods?

A. No.

Q. You did not get any bill of sale from the seller, or anything of that sort, did you?

A. No.

Q. You knew the stock was being turned over to Sondheim by whoever was selling it?

A. Our understanding was that the stock would be in our name, that we would own title to it until we were paid.

Q. Did you take a bill of sale from the seller or do anything to get the title?

A. No.

Q. You understood that was the effect of this agreement which you had with Sondheim?

A. Yes.

Q. You had no agreement with the seller of the stock?

(Testimony of Anthon Eckern.)

A. No.

Q. You knew that Sondheim was paying considerable more than \$2600 for the goods, didn't you?

A. Yes.

Q. Did he tell you what he was paying?

A. I think he did.

Q. About \$6000?

A. I think so.

Q. Did you investigate the stock to see whether it was worth what he said he was paying for it?

A. No.

Q. The bank didn't put its name on the store, or anything of that character, did it?

A. No.

Q. Sondheim ran the business just like he ran his other stores, did he?

A. Yes.

Q. He deposited the proceeds in his own name in your bank from his sales from day to day?

A. Yes.

Q. And he deposited money taken in at the other stores he owned in your bank?

A. Yes.

Q. As a matter of fact, you did not require him to pay one-half of his receipts each day, did you, but I understood that you had an arrangement by which he was to pay you \$500 each week, and that if he failed to do so you were to charge that amount to his account and apply the amount on his notes held by you?

(Testimony of Anthon Eckern.)

A. Yes.

Q. Sondheim could check on his account at your bank, could he?

A. Yes.

Q. And he did check on it from time to time?

A. Yes.

Q. Did you or did you not know it to be a fact that he made new purchases of goods and installed them in this store with the goods purchased from the Pallay estate after he made the original purchase?

A. We did not keep any close check on that.

Q. You knew, he did buy some additional stock, did you not?

A. I presume he did, yes.

Q. Now, as I understand you, you put your man in there on the 13th day of November, 1914?

A. Yes.

Q. Who did you say it was you put in there in charge?

A. Julius Efteland.

Q. What had been his previous business to that time?

A. He bought and sold bankruptcy goods. He had a store on the east side of the river. He was engaged in different lines of business.

Q. Who was in charge before Mr. Efteland?

A. Sondheim was in charge.

Q. But he was out of the city a great deal?

A. Yes, he was out of the city and when he was,

(Testimony of Anthon Eckern.)

he left it in charge of his clerks; he left his clerks there to look out for it.

Q. Just what particular thing, if anything, happened on November 13th to cause you to get hold of Mr. Efteland and send him in there to take charge of the place?

A. Because Sondheim could not be found, and he had not made the payments as he promised and we got kind of uneasy. It was reported that he was sick in Tacoma or Seattle, and we did not know how sick or what would happen; his stores wired they did not know where he was and we could find out nothing about him; we tried to get him on the telephone but could not; could not get in touch with him at all or find out anything about him, and we concluded, if he was going to be sick over there for an indefinite period, it was better for us to protect our interests, and the best thing for us to do was to put a man in charge there, and so we did that.

Q. You had made some unsuccessful attempts to locate him in Tacoma and Seattle?

A. Yes.

Q. Had you not received a telephone message from a bank in Salem calling you attention to what was practically a criminal act on the part of Mr. Sondheim?

A. Not to my recollection we had not. I remember, we heard something about a loan of \$1500 he made in Salem, but I do not recollect the nature of it.

(Testimony of Anthon Eckern.)

Q. Do you remember whether that was after or before you took charge of this place?

A. I don't remember.

Q. Had you asked this man Nelson, whom you mentioned a while ago, to try to find Sondheim in Tacoma or Seattle?

A. Yes, he went up there for that purpose.

Q. You knew he was going up there for that purpose?

A. I knew he was going up for that purpose.

Q. And you expected to get a report from him if he could find Sondheim?

A. Yes.

Q. But you heard nothing from him?

A. We did not hear anything from him.

Q. While ago when I was trying to make a statement of the facts, I made the statement that you had taken charge of the place on the 13th of November and was interrupted with the correction that someone from that place came up and surrendered the stock to you, not that you took possession; who was it surrendered that stock to you on that day; what was the reason for that correction?

A. We talked with Nudleman, the man who had charge of the store before we attempted to do this and he said to us that we could take charge of it at any time we desired.

Q. Did he tell you why?

A. He knew that money was coming to us, that Sondheim owed us money on the stock and when we

(Testimony of Anthon Eckern.)

said that we thought it best to take possession ourselves he made no objection, in fact he said he knew we had a right to take it.

Q. And you sent your man over there on the 13th and took charge?

A. Yes.

Q. Did you pay this man Efteland a salary?

A. No, we have not paid him anything ourselves.

Q. But you are responsible for his employment are you not?

A. Yes, we employed him.

Q. He was the first man whom the bank had employed there?

A. Subject to Sondheim—he was our representative—Efteland.

Q. The bank was not paying the salary of any employes there during the time before Sondheim left?

A. No.

Q. And the bank was not making any purchases of new goods or anything of that character?

A. No.

Q. Did Sondheim make a regular report to you of the new goods he bought?

A. No, he did not.

Q. Did you watch Sondheim's checks of the proceeds of sales there to see what he was doing with the money?

A. Not closely, no.

(Testimony of Anthon Eckern.)

Q. He just continued to check as he had always done before?

A. Yes.

Q. Except that you got this \$500.00?

A. Yes.

**RE-DIRECT EXAMINATION BY
MR. GRAHAM.**

Q. You were asked in your cross-examination concerning the wages due Mr. Efteland for services. Isn't it a fact that out of this \$145.75, which is charged by you for expenses out of the proceeds realized for the sale of goods from the Pallay stock while you were conducting the sale, that Mr. Efteland received some money.

A. Yes, he took \$36.40 from the store and we charged it to his account and put it in the expenses.

Counsel for bank introduced in evidence copies of the four notes signed by D. Sondheim, and the same were respectively marked "Respondent's Exhibit One," "Respondent's Exhibit Two," "Respondent's Exhibit Three," and "Respondent's Exhibit Four."

Q. You were also asked, Mr. Eckern, concerning the additional merchandise that was placed in the store, and inquiry was made of you whether or not Mr. Sondheim had furnished you any record of these additional purchases. Do you know whether or not any new merchandise was placed in the store, and if so what merchandise?

(Testimony of Anthon Eckern.)

A. He bought from three different parties. Fleischner, Mayer & Company, \$76.80. N. & S. Weinstein, \$33.00. Baron Phillips, \$316.26.

Q. Where did you secure this information?

A. I secured it from his books.

MR. GRAHAM: I wish to make a statement at this time with reference to these notes, so there may be no misunderstanding. The credits on the notes were made here recently under my direction and the application made on the old indebtedness rather than on the new. I understood from the bank officials that no direction was given them as to the application of the payments and that the credit was first made on the new note, but I directed them that they had a right and so advised them, to make application of the payment on the old indebtedness, and the change was made. I want the record to show that, so there will be no question about it later on. That was done since the petition was filed by the Trustee asking for the possession of the stock. I am making this statement so no incorrect ideas can be assumed later on.

MR. NELSON: We appreciate very much the fairness of counsel in that respect and in respect to this whole controversy. But I would like to ask whether the credit was originally made on the \$2600.00 note?

MR. GRAHAM: Yes, I mean the note that was

(Testimony of Anthon Eckern.)

given October 22 to cover the advance that was used for the purchase of this stock, but I advised the bank officials that they had the right to make application of these sums received then either on the new or on the old indebtedness and I suggested that the change be made from the new indebtedness, where they had credited it, to the older indebtedness, inasmuch as they had received no instructions from Mr. Sondheim as to how he desired the credits to be made.

MR. NELSON: I would like to see the original notes.

MR. GRAHAM: Certainly, we will bring them over if you desire us to do so at any time you want them.

MR. CANNON: Q. What is the total sum now due your institution, Mr. Eckern?

A. \$1000.43.

Q. I think, you don't understand me. What I want to know is the total sum now due your bank from Sondheim after giving him these credits?

A. Oh, I did not understand you. The amount is \$4140.00.

Q. What credits does that include?

A. The credits on the notes and not accounting for the \$1000.43.

It is stipulated between the parties that the payment of \$500.00 made by Mr. Sondheim by check,

and likewise the items of \$365.00 and \$195.00 charged to his account, were first credited on the note dated October 22, 1914, for \$2600.00. That thereafter and subsequent to the filing of the petition, upon the direction of the attorney for the bank, a change was made of the credits to the old account and notes, and that Exhibits 1, 2, 3, and 4, in so far as the endorsements are concerned, represent the condition of the original notes at the present time since the changes referred to by counsel for the bank were made.

Filed April 19, 1915.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 26th day of April, 1915, there was duly filed in said Court, and cause, Exceptions to the Report of Special Master, in words and figures as follows, to-wit:

EXCEPTIONS.

Comes now the Scandinavian-American Bank, by its attorney, Sidney J. Graham, and files and enters herein the following exceptions to the report of the Special Master upon the petition of the receiver to require it to turn over certain property or the proceeds thereof to the bankrupt estate:

I.

Respondent excepts to the failure of the Special

Master to set out all the facts as developed at the hearing held before said Special Master.

II.

Respondent excepts to the conclusion of the Special Master that the agreement in controversy does not constitute a trust receipt.

III.

Respondent excepts to the conclusion of the Special Master that the instrument is void under the laws of the State of Oregon and under the decision of the Circuit Court of Appeals for this district.

IV.

Respondent excepts to the conclusion of the Special Master that the Trustee has jurisdiction to maintain this proceeding.

V.

Respondent excepts to the conclusion of the Special Master that a decree should be entered restoring to the Trustee the property or the funds representative of the property in controversy.

SIDNEY J. GRAHAM,
Attorney for Scandinavian-American Bank.

STATE OF OREGON, }
County of Multnomah, } ss.

Due service of the within exceptions is hereby accepted in Multnomah County, Oregon, this 26th day of April, 1915, by receiving a copy thereof, duly certified to as such by S. J. Graham, attorney for Bank.

SIDNEY TEISER,
of Attorneys for Trustee.

Filed April 26, 1915.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 17th day of May, 1915, there was duly filed in said Court, and cause, an Order on Exceptions to report of Special Master, said order being also Exhibit A attached to the petition for revision, in words and figures as follows, to-wit:

**ORDER ON EXCEPTIONS TO REPORT OF
SPECIAL MASTER.**

This cause was heard upon the exceptions of the Scandinavian-American Bank to the report of Mr. A. M. Cannon, Special Master herein, upon the petition of the receiver to require said Scandinavian-American Bank to turn over certain property or the proceeds thereof to the Bankrupt Estate, and was ar-

gued by Mr. Sidney J. Graham of Counsel for said Scandinavian-American Bank and by Mr. Sidney Teiser of counsel for the trustee of said bankrupt. On consideration whereof it is ordered that said exceptions be and the same are hereby overruled; that the report of the Special Master be, and the same is hereby affirmed, and that the Scandinavian-American Bank be, and it is hereby ordered and directed to turn over to the Trustee herein the property or proceeds thereof as prayed for in the petition of said Trustee.

Witness the Honorable Robert S. Bean, Judge of said Court, and the seal thereof at Portland in said District, this 17th day of May, 1915.

(Seal)

G. H. MARSH, Clerk.

Filed March 17, 1915.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 21st day of May, 1915, there was duly filed in said Court, and cause, a decree on the petition of R. L. Sabin, said decree being also Exhibit B attached to the petition for revision, in words and figures as follows, to-wit:

DECREE.

BEFORE HONORABLE R. S. BEAN, JUDGE
OF THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON:

This cause came on this day to be heard upon the exceptions to the report of the Special Master herein filed by the Scandinavian-American Bank, and it appearing to the court that a petition requiring the Scandinavian-American Bank to turn over certain property belonging to the alleged bankrupt was filed herein by the receiver, prior to the election of the trustee, and

It further appearing that at the time said petition was filed the Scandinavian-American Bank was claiming certain property and the proceeds of certain property sold, possession of which was taken by them under a certain instrument entered into between said Scandinavian-American Bank and D. Sondheim, copy of which was attached to said petition of the receiver filed herein,

And it further appearing that the said Scandinavian-American Bank answered said petition and contested the right of the receiver therein, and maintained its right to the property held by it under said instrument,

And it further appearing that said Scandinavian-American Bank for a period of about ten days conducted a sale at retail of the property held by it under said instrument, and was then enjoined from further disposing of said property by this Court.

And it further appearing that a stipulation was entered into between said Scandinavian-American Bank and said receiver whereby an inventory was

to be taken of the property on hand at the time of said stipulation, and the property sold by said receiver, and the money realized from the sale thereof, less the expenses of sale, should be held by said receiver and deposited in said Scandinavian-American Bank subject to the rights of said parties to the property in question, as should thereafter be determined by this Court, upon which stipulation an order was entered pursuant thereto.

And it further appearing that pursuant to said stipulation and order the receiver sold said property with the approval of said Court, and realized therefrom, after deducting the expenses of sale, the sum of \$3476.70, which sum is now held on deposit in said Scandinavian-American Bank as stipulated.

And it further appearing that during the ten days that the Scandinavian-American Bank was in possession of said property and making sale thereof, it realized the net sum of \$1000.43, subject to a claim of one Julius Efteland for ten days' services, less the sum of \$36.40 paid to said Julius Efteland.

And it further appearing that the Scandinavian-American Bank in its answer filed herein objected to the jurisdiction of the Court to pass upon the questions at issue,

And it further appearing that the Scandinavian-American Bank subsequently filed an amended answer waiving the objection to the jurisdiction of

the Court herein to try the matter summarily, and that said Scandinavian-American Bank and said receiver stipulated in open court, through their respective attorneys, that the trustee elected by the creditors in said bankruptcy cause have authority to proceed in the matter in place of said receiver without further order of the Court, and further stipulated that the matter be referred to A. M. Cannon, Esquire, as Special Master, to hear the parties therein and take such evidence as might be desired to be introduced, as to the rights of the parties to the property or its proceeds therein, and to report his findings to the Court.

And it further appearing that an order of this Court was made pursuant to said stipulation, and that R. L. Sabin, Trustee, did proceed herein against said Scandinavian-American Bank as aforesaid, and that said matter was duly referred to said A. M. Cannon, as Special Master, for the taking of testimony and evidence and for a report with his recommendations and findings therein,

And it further appearing that said A. M. Cannon, Special Master, duly took said evidence and made and filed his findings and recommendations herein, wherein he recommended that such order or decree be entered by this Court as would restore to the trustee the funds representative of the property in controversy,

And it further appearing that the Scandinavian-

American Bank has duly excepted to the report and recommendations of said Special Master herein, and that the matter was duly heard by this Court upon said exceptions and was argued by counsel for the respective parties, and the Court having fully considered the matter, now therefore,

IT IS ADJUDGED, ORDERED, AND
DECREED

that the exceptions to the Special Master's report be, and the same hereby are overruled.

AND IT IS FURTHER ADJUDGED,
ORDERED, AND DECREED

that the Scandinavian-American Bank pay unto R. L. Sabin, trustee, herein, upon surrender of the cashier's check held by him in the amount of \$3476.70, the said sum of \$3476.70, and the further sum of \$1000.43, said latter amount being the net proceeds of sale realized by the Scandinavian-American Bank from the sale of property by it prior to the injunction order of this court and the taking possession by said R. L. Sabin of said property under said stipulation and order heretofore mentioned.

AND IT IS FURTHER ADJUDGED,
ORDERED, AND DECREED

that the amount due by said Scandinavian-American Bank to Julius Efteland for ten days' services, as

set forth herein, less the amount of \$36.40 paid him by said bank, be, and the same is hereby a lien upon the funds in the hands of the trustee herein, and said trustee is directed to pay to the said Julius Efteland the amount due him by said bank.

**AND IT IS FURTHER ADJUDGED,
ORDERED, AND DECREED**

that said Scandinavian-American Bank pay unto said R. L. Sabin, trustee, interest at the rate of 6% per annum from the date of this decree, upon said moneys, together with costs and disbursements herein.

Dated this 21st day of May, 1915.

(Signed) ROBERT S. BEAN,
Judge.

Filed May 21, 1915. G. H. MARSH, Clerk.

And afterwards, to-wit, on the 1st day of June, 1915, there was duly filed in said Court, and cause, an Opinion, in words and figures as follows, to-wit:

OPINION.

In the matter of D. Sondheim, bankrupt, submitted on motion to review the action of the referee in bankruptcy in disallowing the claim of the Scandinavian-American Bank for a preference.

It appears from the undisputed evidence in the case that in October, 1914, Sondheim was engaged

in the general merchandise business in the City of Portland, Oregon, and elsewhere, buying and selling bankrupt stocks; that on October 22, he applied to the Scandinavian Bank for a loan of \$2600.00 to enable him to purchase a stock of goods then offered for sale by the trustee in bankruptcy. At that time he was indebted to the bank for a note for \$2600.00. The bank advanced the money with which, and some of his own funds, he purchased this bankrupt stock, paying about \$5680.00 for it. At the time the money was advanced, he executed to the bank a written instrument reciting that the \$2600.00 was to be used in the purchase of this stock of goods, that he should hold the title to it in trust for the bank as far as necessary to protect it, that the bank should have the privilege of putting a cashier in charge of these goods to keep an account of the sales, and that the bankrupt should pay over to the bank each day one-half the proceeds of the sales. This latter clause was not observed, but Sondheim bought the stock of goods, assumed the control of it, sold and disposed of it in the regular course of the business, deposited the proceeds to his individual account in this bank and checked them out as he saw proper. The arrangement about the proceeds was changed by mutual agreement, so that Sondheim agreed to pay to the bank on this \$2600.00 claim \$500.00 a week, and he did that for one or two weeks, but thereafter failed to do so.

This instrument was never recorded. Thereafter Sondheim took advantage of the bankrupt act and it

is now claimed by the bank that it is entitled to a preference or preferred lien upon this stock of goods for the \$2600.00 advanced on it.

There are two grounds urged by the bank in support of this contention. The first is that Sondheim stood to it in place of a trustee, held the goods in legal effect as a trustee for the bank, but the difficulty with that position is that the bank never owned these goods or never purchased them; it simply loaned to Sondheim \$2600.00, with which he might purchase. He took the title in his own name, proceeded to sell and dispose of the goods in the regular course of business, and therefore was not in any sense the holder of the title in this case as trustee for the bank.

Then again it is urged that this instrument is valid because the referee found, and it is no doubt true, that the transaction was entered into in perfect good faith by the bank, but as I understand the decisions of the Oregon courts, a mortgage on a shifting stock of goods where the mortgagor is permitted to remain in possession and sell and dispose of it in the regular course of business, appropriate to his own use, or use as he may see proper, is void as to creditors, and therefore this instrument, I take it, is a void instrument and did not give the bank any preference over the other creditors of this concern.

It is also claimed the trustee in bankruptcy is not in position to question the validity of this instru-

ment. Prior to the amendment of 1910, to the bankruptcy act the Trustee was not clothed with the privilege of a judgment creditor, but to obviate this condition the amendment of 1910 was adopted, which was intended to vest in the Trustee the same rights to attack secret unrecorded liens which were void under the state statute as was given to a judgment creditor under the state law. And under that provision of the bankruptcy act I take it that the trustee in bankruptcy is in position to question the validity of this mortgage, which was void from the beginning, and therefore the decision of the referee in bankruptcy will be affirmed.

Filed June 1, 1915. G. H. Marsh, Clerk.

And to-wit, on the 26th day of May, 1915, there was duly filed in said Court, and cause, a Petition for Appeal, in words and figures as follows, to-wit:

PETITION FOR APPEAL.

The above entitled bank, conceiving itself aggrieved by the order and decree made and entered on the 17th day of May, 1915, in the above entitled Court and cause, and the subsequent order and decree made and entered on the 21st day of May, 1915, in the above entitled Court and cause, does hereby appeal from such orders and decrees to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the assignment

of errors which is filed herewith and the said banking corporation prays that this appeal may be allowed and that a transcript of the records, proceedings and papers upon which such orders and decrees were made, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit.

SIDNEY J. GRAHAM,
Attorney for Scandinavian-American Bank.

The foregoing claim of appeal is allowed on this 26th day of May, 1915, and is to operate as a supersedeas of the orders and decrees complained of upon the execution of a satisfactory bond in the sum of \$5000.00.

Dated May 26, 1915.

CHAS. E. WOLVERTON,
District Judge.

STATE OF OREGON, }
County of Multnomah, } ss.

Due service of the within petition for Appeal is hereby accepted in Multnomah County, Oregon, this 26th day of May, 1915, by receiving a copy thereof, duly certified to as such by Sidney J. Graham, attorney for Scandinavian-American Bank, a corporation.

SIDNEY TEISER,
Attorney for R. L. Sabin, Trustee.

Filed May 26, 1915. G. H. MARSH, Clerk.

And afterwards, to-wit, on the 26th day of May, 1915, there was duly filed in said Court, and cause an Assignment of Errors, in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS.

The Scandinavian-American Bank assigns the following as the errors upon which it will rely upon its appeal from the orders and decrees made and entered in the above entitled Court and cause on the 17th day of May, 1915, and the 31st day of May, 1915.

Said bank believes and alleges said orders and decrees to have been erroneous in that:

1. The Court overruled its exceptions to the Special Master's report.

2. The Court failed to sustain its exceptions to the Special Master's report.

3. The Court confirmed the report of the Special Master and further ordered that this bank pay to the Trustee the sum of \$1000.43, and the costs and disbursements of the proceeding.

4. The Court confirmed the report of the Special Master, holding the agreement in controversy did not amount to a contract of conditional sale, or a trust receipt.

5. The Court confirmed the report of the Special Master, holding the agreement in controversy void as a chattel mortgage under the laws of the State of Oregon.

6. The Court confirmed the report of the Special Master, holding that the possession of the property by this bank prior to a levy by any creditor and prior to the filing of the petition in involuntary bankruptcy did not entitle this bank to hold said goods until its indebtedness was repaid.

7. The Court confirmed the report of the Special Master, holding that the Trustee could question this conveyance.

The Court made and entered the following orders and decrees:

“This cause was heard upon the exceptions of the Scandinavian-American Bank to the report of Mr. A. M. Cannon, Special Master herein, upon the petition of the receiver to require said Scandinavian-American Bank to turn over certain property or the proceeds thereof to the bankrupt estate, and was argued by Mr. Sidney J. Graham of counsel for said Scandinavian-American Bank and by Mr. Sidney Teiser, of Counsel for the Trustee of said bankrupt. On consideration whereof it is ordered that said exceptions be and the same are hereby overruled; that the report of the Special

Master be, and the same is hereby affirmed, and that the Scandinavian-American Bank be, and it is hereby ordered and directed to turn over to the Trustee herein, the property or proceeds thereof as prayed for in the petition of said Trustee.”

And on the 21st day of May, 1915, omitting certain recitals therein, the following order and decree:

“IT IS ADJUDGED, ORDERED, AND DECREED, that the exceptions to the Special Master’s report be, and the same hereby are overruled.

AND IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that the Scandinavian-American Bank pay unto R. L. Sabin, trustee herein, upon surrender of the cashier’s check held by him in the amount of \$3476.70, the said sum of \$3476.70, and the further sum of \$1000.43, said latter amount being the net proceeds of sale realized by the Scandinavian-American Bank from the sale of property by it prior to the injunction order of this Court and the taking possession by said R. L. Sabin of said property under said stipulation and order heretofore mentioned.

AND IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that the amount due by said Scandinavian-American Bank to

Julius Efteland for ten days' services, as set forth herein, less the amount of \$36.40 paid him by said bank, be, and the same is hereby a lien upon the funds in the hands of the trustee herein, and said trustee is directed to pay to the said Julius Efteland the amount due him by said bank.

AND IT IS FURTHER ADJUDGED, ORDERED AND DECREED that said Scandinavian-American Bank pay unto said R. L. Sabin, trustee, interest at the rate of 6% per annum from the date of this decree, upon said moneys, together with costs and disbursements herein."

WHEREFORE, the Scandinavian-American Bank prays that the Court allow the appeal from said orders and decrees, and that the same be reversed and that said Court be directed to enter an order and decree herein sustaining its exceptions to the Special Master's report and confirming its possession of said property, and for such other and further relief as may be proper.

SIDNEY J. GRAHAM,
Attorney for Appellant.

STATE OF OREGON, }
County of Multnomah, } ss.

Due service of the within Assignment of Errors on Appeal is hereby accepted in Multnomah County, Oregon, this 26th day of May, 1915, by receiving a

copy thereof, duly certified to as such by Sidney J. Graham, attorney for Scandinavian-American Bank.

SIDNEY TEISER,

Attorney for R. L. Sabin, Trustee.

Filed May 26, 1915. G. H. MARSH, Clerk.

And afterwards, to-wit, on the 26th day of May, 1915, there was duly filed in said Court, and cause, a Bond on Appeal, in words and figures as follows, to-wit:

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, THAT WHEREAS, on the 17th day of May, 1915, on the 21st day of May, 1915, at a District Court of the United States for the District of Oregon, in a proceeding pending in said Court between R. L. Sabin, trustee of the estate of D. Sondheim, bankrupt, as petitioner, and the Scandinavian-American Bank, a corporation, orders and decrees were made and entered against said Scandinavian-American Bank overruling its exceptions to the report of the Special Master, in which he recommended that an order or decree be entered restoring to the Trustee the funds representative of the property in controversy, and confirming the report of the Special Master and further providing that the sum of \$1000.43 realized by said bank from sales of said merchandise prior to the filing of the petition in

bankruptcy and the costs and disbursements of the proceeding be paid to said Trustee.

And, WHEREAS, said Scandinavian-American Bank has obtained an appeal and filed a copy thereof in the clerk's office of this Court to reverse said orders and decrees and a citation directed to said R. L. Sabin, trustee of the estate of D. Sondheim, bankrupt, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, in said Circuit, within thirty days hereof.

NOW THEREFORE, in consideration of the premises, we, the Scandinavian-American Bank, a corporation, as principal, and C. F. Henderson, as surety, are held and firmly bound to said R. L. Sabin, trustee of the estate of D. Sondheim, bankrupt, in the full and just sum of \$5000.00, to be paid to said R. L. Sabin, his executors, administrators, successors, and assigns, and to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

The condition of the above obligation is such, however, that if said Scandinavian-American Bank shall prosecute its appeal to effect and answer the damages and costs, and pay the sums provided for in the orders complained of, if it fail to make its plea good, then the said above obligation shall be void, otherwise, to remain in full force and effect.

WITNESS our hands and seals this 26th day of May, 1915.

(Corporate Seal)

SCANDINAVIAN AMERICAN BANK.

By ANTON ECKERN, Cashier.

C. F. HENDRICKSEN (Seal)

Approved by

CHAS. E. WOLVERTON,

District Judge.

STATE OF OREGON, }
County of Multnomah, } ss.

I, C. F. Hendricksen, whose name is subscribed to the within undertaking as surety, being first duly sworn, depose and say: That I am a resident and householder within the State of Oregon, and am not a counsellor or attorney at law, sheriff, clerk or other officer of any Court, and am worth the sum of Ten Thousand Dollars over and above all debts and liabilities, and exclusive of property exempt from execution.

C. F. HENDRICKSEN.

Subscribed and sworn to before me this 26th day of May, 1915.

(Seal)

A. L. MORLAND,

Notary Public for Oregon.

STATE OF OREGON, }
County of Multnomah, } ss.

Due service of the within Bond on Appeal is hereby accepted in Multnomah County, Oregon, this 26th day of May, 1915, by receiving a copy thereof, duly certified to as such by Sidney J. Graham, attorney for the Scandinavian-American Bank.

SIDNEY TEISER,
Attorney for R. L. Sabin, Trustee.

Filed May 26, 1915. G. H. MARSH, Clerk.

And afterwards, to-wit, on the 26th day of May, 1915, there was duly filed in said court and cause a Stipulation to Combine Petition for Revision and Appeal in words and figures as follows, to-wit:

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that inasmuch as counsel for Scandinavian-American Bank are uncertain whether the proper procedure on review is by petition or by an appeal, that the petition to review the order of the District Court and the appeal therefrom may be heard simultaneously and upon a single printed record, and that such record shall be deemed and be taken as and for a record in both the proceedings by petition for

review and on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 26th day of May, 1915.

SIDNEY TEISER,
Attorney for R. L. Sabin, Trustee.

SIDNEY J. GRAHAM,
Attorney for Scandinavian-American Bank.

Filed May 26th, 1915. G. H. MARSH, Clerk.

And afterwards, to-wit, on the 26th day of May, 1915, there was duly filed in said Court, and cause, a Praeceptum for Transcript, in words and figures as follows, to-wit:

PRAECEPTUM FOR TRANSCRIPT.

To G. H. MARSH, Esq., Clerk of the District Court:

Please prepare, certify and transmit to the United States Circuit Court of Appeals for the Ninth Circuit, copies of:

Petition of receiver.

Stipulation to sell property.

Order upon said stipulation.

Amended answer of bank.

Order of reference.

Report of Special Master, and evidence and exhibits attached thereto.

Exceptions of Scandinavian-American Bank to report of Special Master.

Opinion of the Court.

Order of May 17, 1915, overruling exceptions.

Subsequent order and decree of May 21, 1915.

Petition for appeal.

Bond on appeal.

Assignment of errors.

Citation on appeal.

Stipulation.

This praecipe.

Dated at Portland, Oregon, this 26th day of May,
1915.

SIDNEY J. GRAHAM,

Attorney for Scandinavian-American Bank.

STATE OF OREGON, }
County of Multnomah, } ss.

Due service of the within praecipe is hereby
accepted in Multnomah County, Oregon, this 26th
day of May, 1915, by receiving a copy thereof, duly
certified to as such by Sidney J. Graham, attorney
for Scandinavian-American Bank,

SIDNEY TEISER,

Attorney for R. L. Sabin, Trustee.

Filed May 26, 1915. G. H. MARSH, Clerk.

UNITED STATES OF AMERICA, }
District of Oregon, } ss.

I, G. H. Marsh, clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record on review of, and on appeal from, the Order and Decree of the District Court of the United States for the District of Oregon, in the proceeding in said Court in the matter of D. Sondheim, bankrupt, between R. L. Sabin, trustee of the estate of said D. Sondheim, bankrupt, and the Scandinavian-American Bank, in accordance with law and the rules of this Court, and in accordance with the praecipe of the appellant and the stipulation of the parties filed in said cause, and that the said record is a full, true and correct transcript of the record and proceedings had in said court, in accordance with said praecipe, as the same appears of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing record is \$——— for clerk's fees for preparing the transcript of record and \$——— for printing said record, and that the same has been paid by said appellants.

In testimony whereof I hereunto set my hand and affixed the seal of said Court, at Portland, in said district, on the —— day of ———, 1915.

Clerk.